FILED
JAN 5 1967
JOHN F. DAVIS, CLERK

937

IN THE

SUPREME COURT OF THE UNITED STATES.

HOLDEN BROWN, GEORGE HOUSE and
GEORGE WOLFF et al.,
Petitioners,

vs.

STERLING ALUMINUM PRODUCTS CORPORATION,
a Missouri Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

JEROME J. DUFF,
Suite 1155—818 Olive Street,
St. Louis, Missouri 63101,
314 MAin 1-3833,
Attorney for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	5
Appendix:	
A. Opinion of 8th Circuit Court of Appeals	7-18
B. Petition for Rehearing and Order Denying	19-25

AUTHORITIES.

Cases.

General Drivers Union v. Riss Co., Inc., 372 U. S. 517, 83 S. Ct. 789 (1963)	4
Republic Steel Corp. v. Maddox, 379 U. S. 650, 85 S. Ct. 614 (1965)	4
Woody, et al. v. Sterling Aluminum Products Co., et al., 365 F. 2d 448 (8th Cir. 1966)	5

Statutes.

28 U. S. C., Sec. 1254 (1)	2
28 U. S. C., Sec. 185 (L. M. R. D. A., 1957, Sec. 301)	4

IN THE

SUPREME COURT OF THE UNITED STATES.

HOLDEN BROWN, GEORGE HOUSE and
GEORGE WOLFF et al.,
Petitioners,

vs.

STERLING ALUMINUM PRODUCTS CORPORATION,
a Missouri Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioners, Holden, Brown, George House and George Wolff, in behalf of themselves and as a bargaining committee for and in behalf of the molder and foundry employees of the respondent corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause on September 12th, 1966 and affirmed by an Order denying Petitioners' petition for rehearing entered on October 7th, 1966.

OPINIONS BELOW.

The opinion of the District Court is reported in 246 F. Supp. 279. The opinion of the Eighth Circuit Court of Appeals is reported in 365 F. 2d 651. A copy of that opinion is appended to this petition as Appendix "A" (infra, pages 7 to 18).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 12th, 1966. A timely petition for rehearing was filed and is appended to this petition as Appendix "B" (infra, pages 19 to 25). This petition for rehearing was denied on October 7th, 1966. The jurisdiction of this Court is invoked under the act of June 25, 1948, c. 646 (1), 62 Stat. 928 (1); U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. When a labor union abandons a contract grievance can the involved aggrieved employees obtain specific federal court enforcement of a broad form, mandatory labor agreement Grievance Procedure?

2. If the labor agreement Grievance Procedure is all encompassing and mandatory but does not specifically provide for "arbitration" should the federal court fashion a remedy to compel the parties to "diligently and in good faith explore some other method for the final disposition" of their grievance as is literally required by the labor agreement?

STATEMENT OF THE CASE.

Petitioners had been employed by the respondent corporation, an interstate manufacturer, at a manufacturing plant in St. Charles, Missouri. Petitioners were all members of the International Molders and Foundry Workers Union which was exclusive bargaining representative for petitioners at the St. Charles, Missouri plant. A labor agreement was in effect between the union and respondent corporation from March 1, 1961 to February 28, 1963. The employer terminated the employment of petitioners, closed down and re-located its St. Charles plant on and immediately after February 28th, 1963.

Upon being advised of the Company's unilateral decision to terminate the agreement in order for the Company to re-locate its St. Charles operations to Malden, Missouri, the petitioners, as members of a shop committee, attempted to bargain with the Company respecting its intention to relocate its plant. This attempt to bargain was before the agreement had expired, but the Company refused to so bargain (Opinion of 8th Cir.—Appendix "A", page 9).

The Union filed a suit against the Company ten months after the plant moved. The suit was never prosecuted and was dismissed by a stipulation between the Company and the Union at the cost of the Union (8th Cir. opinion, Appendix "A", pages 9 and 10).

In February, 1965, these petitioners instituted this action in the federal district court. These nominal petitioners, House, Brown and Wolff, are the "shop committee" designated throughout the Grievance Procedure Article of the labor agreement (R. 15, 16 and 17).

The district court below dismissed the Complaint. The Eighth Circuit Court of Appeals affirmed the ruling of the district court. The Court of Appeals affirmed the dismissal for three reasons:

1. The union alone has the right to bargain with management on the broad policy issues framed by the contract grievances described in this case (Appendix "A", page 14).

2. The Grievance Procedure machinery of this labor agreement does not specifically require arbitration (Appendix "A", page 17).

3. The subject matter of this dispute is not within the framework of the Grievance machinery of the labor agreement (Appendix "A", page 18).

REASONS FOR GRANTING THE WRIT.

Taking a carefully calculated risk of over-simplification and understatement these petitioners state that the mandate of this Court in the case of Republic Steel v. Maddox, 379 U. S. 650, 85 S. Ct. 614 (1965), has been completely misinterpreted by the Court of Appeals below. The petitioners' union refused to press the claim of these members-employees when it perfunctorily abandoned the friendly lawsuit which it filed against the company. When the petitioners realized their plight they sought redress in the only form and forum which the national labor laws allowed. They filed this suit in a federal district court to enforce the terms of an all-encompassing and mandatory grievance procedure. They have attempted to adhere to every requirement set out in Maddox.

Without a trial or a hearing these petitioners are next told that the type of grievance which they assert is in some mysterious way excluded from the grievance procedure machinery of their labor agreement. This incredible finding is made in spite of a grievance clause which "shall" (the word is used eight times, R. 15 and 16) be utilized to attempt a satisfactory adjustment and/or settlement of "any difference" or "any controversy or grievance that may arise from time to time" (R. 15 and 16). There is not even a hint at excluding this dispute, or any other, from the operation of this grievance machinery.

The Court of Appeals below further refused to act in behalf of these petitioners because the grievance machinery does not contain the word "arbitration" which the Court went on to say was the necessary "predicate to granting the kind of relief plaintiffs are seeking under Sec. 301. See, General Drivers, etc., Union No. 89 v. Riss and Company, Inc., 372 U. S. 517 (1963)." Petitioners respectfully submit that the holding of this Court in Drivers Union v. Riss Co., not only does not support the posi-

tion of the Eighth Circuit Court of Appeals in this case it is actually in total support of the petitioners' position.

These petitioners stand before this Court stripped of every benefit which the labor law doctrines of this country propose to offer—they have lost their jobs, their plant and tools, their union recognition, their labor agreement and, finally, their constitutional right to be heard to assert their position in response to the series of unilateral decisions (the company's to re-locate, the union's to abandon them and the courts' below to summarily dismiss their litigation) all of which brings them to this Court. They are entitled to the relief which they seek in their Complaint.[1] The decisions below are not in keeping, in letter or in spirit, with the uniform body of federal common law of labor relations.

CONCLUSION.

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

JEROME J. DUFF,
Suite 1155—818 Olive Street,
St. Louis, Missouri 63101,
314-MAin 1-3833,
Attorney for Petitioners.

Certificate of Service.

State of Missouri, } ss.
City of St. Louis. }

I, Jerome J. Duff, counsel for the Petitioners herein, and attorney of record for the Petitioners in the Courts below,

---

[1] The Court will note that this case is companion in some respects to the case of Woody, et al., v. Sterling, etc., et al., 365 F. 2d 448 (8th Cir. 1966) (See Appendix "B", page 26, ft. note No. 3). A petition for Writ of Certiorari will be filed in the Woody case within three days of the filing of this petition.

depose that on the 4 day of January, 1967, I served four copies of the foregoing Petition for Writ of Certiorari on the Respondent, as required by Rule 33, Paragraph 1, by personally delivering said copies hereof to Messrs. Bartlett, Stix and Bartlett, Attorneys of Record for the Respondent, in care of their offices, 408 Pine Street, St. Louis, Missouri 63101.

Jerome J. Duff,
Member of the Bar of the
United States Supreme Court.

APPENDIX.

APPENDIX A.

Opinion of the
United States Court of Appeals
For the Eighth Circuit.

No. 18,218.

Holden Brown, George House and George Wolff,
Appellants,
v.
Sterling Aluminum Products Corporation, a Missouri Corporation,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[September 12, 1966.]

Before VAN OOSTERHOUT, BLACKMUN and GIBSON, Circuit Judges.

GIBSON, Circuit Judge.

The appellants, Holden Brown, George House and George Wolff, as plaintiffs filed a complaint in the District Court for the Eastern District of Missouri, against Sterling Aluminum Products Corporation (hereinafter referred to as "Company"), a Missouri corporation, engaged in activities which affect interstate commerce under the provisions of the Labor Management Relations Act, 1947

(Act) 29 U. S. C., § 141 et seq., claiming a breach by the Company of a collective bargaining agreement (Agreement). The three plaintiffs were members of the employees' Shop Committee created under the agreement executed by the Union with the Company, and they claim the sole right to institute this proceeding as a class action, based on § 301 of the Act[1] (29 U. S. C., § 185).

The District Court, after considering the matter on plaintiffs' motion for order of partial summary judgment and defendant's motion to dismiss, entered an order and judgment dismissing the complaint on the bases "that plaintiffs have failed to state a claim upon which this court can grant relief," that it did not have jurisdiction to grant the relief sought by plaintiffs, and laches. A motion for new trial was overruled and a timely appeal was taken to this Court.

The factual background of the complaint is as follows: The Company maintains and operates manufacturing plants in several states, including Missouri. Its plant at St. Charles, Missouri, was closed February 28, 1963 and similar operations commenced at a new location in Malden, Missouri. The plaintiffs were employed in the Foundry Department of the St. Charles plant, which department constituted a bargaining unit represented by the International Molders and Foundry Workers Union of North America, Local No. 59 AFL-CIO (Union). The Union and Company had entered into a collective bargaining agreement for a two-year period effective March 1, 1961 and extending through February 28, 1963. On December 26, 1962, the Company gave notice of termination of this agreement on the expiration date, February 28, 1963, in accordance with the provisions of the termi-

---

[1] All sectional references in this opinion are to sections of the Labor Management Relations Act, 1947, as amended (29 U. S. C., § 141 et seq.)

nation clause contained in Article XIV of the agreement and also in conformity with § 8 (d) (1) of the Act (29 U. S. C., § 158 (d) (1)).[2] Upon being advised of the Company's decision to terminate the agreement because of the Company's proposed and intended termination of all operations at its St. Charles plant and renewal or relocation of operations at Malden, Missouri, the plaintiffs, as members of the Shop Committee, attempted to bargain with the Company respecting its intention to relocate its plant. This attempt to bargain was before the agreement had expired, but the Company refused to so bargain. All foundry unit employees (approximately 220), together with all other units of employment at the St. Charles plant, were terminated on their contract termination dates, and the Company then commenced new operations at Malden, Missouri.

No unfair labor practice was filed with the National Labor Relations Board relative to the Company's unilaterial action in closing the St. Charles plant and relocating at Malden, but the Union filed a suit against the Company on December 26, 1963, in the District Court for the Eastern District of Missouri, based on the relocation of the Company's plant, asserting a breach of the agreement in denying recall privileges, pursuant to Article V, § 3 (f) of said agreement. This suit, No. 63 C 450 (c), was dismissed under a stipulation for dismissal with preju-

---

[2] The part of § 8 (d) (1) pertinent to this notice reads as follows:

"* * * *Provided*, That where there is in effect a collective-bargaining contract covering employees in industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;"

dice to the Union plaintiff and at plaintiff's costs on August 26, 1964.

Plaintiffs assert the right to file this action on behalf of themselves as member of the Shop Committee and on the behalf of all other members in their bargaining unit similarly situated on the basis of §§ 8, 9 and 301 of the Act. They contend that their prospective loss of employment through the relocation of the plant gave rise to a grievance, on which they unsuccessfully sought to bargain with the Company under an agreement, and that since the Company refused to so bargain, the Court under the statutory provisions mentioned should enter an order directing the Company, "To commence to attempt a satisfactory settlement of the various grievances alleged herein by bargaining with the plaintiffs * * * as provided in Article III, Sections 3 and 4 of the labor agreement"; and they also request the Court to restore the *status quo ante* to February 27, 1963 of the plaintiffs' employment by payment to plaintiffs and other employees in their unit $150 per week plus accrued interest and that such pay and contractual benefits be paid until such time as the parties have bargained and negotiated a satisfactory disposition of the grievances set out in the complaint. In their motion for partial summary judgment, plaintiffs requested that the amount of $1,185,000 representing approximately one-half of the gross back wages claimed owing to approximately 220 employees for 110 weeks be secured by the posting of collateral by the Company.

Te Company's motion to dismiss the complaint alleges: (1) lack of jurisdiction over the subject matter; (2) the remedies sought by plaintiffs are within the exclusive jurisdiction of the National Labor Relations Board; (3) limitations imposed by § 160 (b) of the Act (6 months); (4) laches; (5) failure to state a claim upon which relief can be granted by the court; (6) *res judicata* based on

the Union's suit against the Company, which was by stipulation dismissed with prejudice, and (7) plaintiffs' lack of capacity to sue for the relief sought.

The District Court (Honorable John K. Regan) in a memorandum opinion filed August 18, 1965 (not reported), overruled plaintiffs' motion for partial summary judgment, sustained defendant's motion to dismiss and entered judgment accordingly. The basis for the opinion was that plaintiffs had failed to state a claim upon which the Court could grant relief. The Court in its opinion pointed out that the agreement was between the Company and the Molders Union, and the Union was not a party to this action; that the plaintiffs as former members of the Shop Committee were not entitled at this time to sue for specific performance, that whatever rights were granted by Article III (grievance procedure) may be enforced only by the Union; and that the plaintiffs lacked standing to sue. The Court also pointed out that arbitration is not required by the agreement and could not be compelled in any event, even by the Union, since the agreement contains no reference to arbitrating any grievance or even dispute concerning the meaning and interpretation of the agreement; there is no provision for compulsory arbitration but only for the voluntary composure of the differences between parties themselves; that the alleged grievances of the plant closing did not come into existence until after the agreement terminated; and finally that laches would apply as a bar, because the plaintiffs by waiting two years to bring this action are not now in a position to seek compulsory discussion with respect to the closing of the plant, since a fundamental change of the relationship of the parties has occurred in the interim, which would make the requested discussion useless. The Court did not rule on the *res judicata* defense as its other ruling were dispositive of the case.

The first question for determination is whether the District Court had jurisdiction to rule upon this dispute. Section 301 (a) of the Act (29 U. S. C., § 185) clearly allows the Union to file a suit for an alleged breach of the collective bargaining agreement.[3] *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U. S. 448 (1957); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U. S. 574 (1960); *John Wiley & Sons, Inc. v. Livingston,* 376 U. S. 543 (1964). The law clearly recognizes that in a given factual situation a particular act may be an unfair labor practice as defined by the Act and at the same time constitute a breach of the collective bargaining agreement between the parties. Any complaint about an unfair labor practice, of course, must be directed to the National Labor Relations Board. The Court of Appeals only reviews the findings of the Board with a duty to order enforcement if warranted by substantial evidence on the record. However, if the factual situation also gives rise to a breach of contract action, the aggrieved party is not limited to the National Labor Relations Board. The District Courts have original jurisdition under § 301 to pass upon this contractual dispute independent of any unfair labor practice. As stated in *Smith v. Evening News Association,* 371 U. S. 195, 197 (1962), "* * * The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." See, *Carey v. General Electric Company,* 315 F. 2d 499 (2 Cir. 1963), cert. denied, 377 U. S. 908.

---

[3] § 301

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The question of an unfair labor practice[4] is not before us. The National Labor Relations Board has sole and exclusive original jurisdiction to determine whether the Company's actions violated their duties under the Act, and the Courts have no original jurisdiction to make such a determination. Our sole function is to determine if the plaintiffs are entitled to relief under the specific contractual provisions contained in the collective bargaining agreement.

Though it is well established that a Union may prosecute a breach of contract action under § 301 even though the breach may also involve an unfair labor practice, the right of the individual members of the Union to file this suit independently of the Union has been questioned.

Under certain restricted circumstances the law clearly allows the individual members of the Union to bring an action under § 301 to enforce their individual rights. *Smith v. Evening News Association*, supra; *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965); *Belk v. Allied Aviation Service Company of New Jersey, Inc.*, 315 F. 2d 513 (2 Cir. 1963), cert. denied 375 U. S. 847. These cases allow the individual enforcement of rights secured under a collective bargaining agreement after certain prerequisites have been met, such as seeking use of established grievance machinery and affording the Union a chance to act on their behalf. If these conditions precedent to filing the suit have been met, no one could seriously contest the plaintiff's right to individually enforce any contractual rights acquired under the agreement and sue for any breach by the Company that occurred during the

---

[4] "§ 8 Unfair Labor Practices

"(a) It shall be an unfair labor practice for an employer—

"(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159 (a) of this title."

term of the agreement, such as unpaid salary or other monetary claims.[5]

We believe, however, that for an individual to bring an action under § 301 he must be seeking to enforce a right that is personal to him and vested in him at the time of the suit. *Humphrey v. Moore*, 375 U. S. 335 (1964). Therefore, individual suits to compel arbitration of individual grievances are permissible as are individual suits to enforce an arbitration award in which the individual has a personal interest. *Smith v. Evening News Association*, supra. However, whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the Union as the sole representative of that unit would normally have the standing to enforce the right. Thus the individual would have no standing to compel discussion of broad collective bargaining principles such as the re-negotiation of a new contract or the re-location of a plant, even if such discussion were required by the existing collective bargaining agreement. Section 159 (a) of the Act designates the representatives selected by a majority of the employees in a unit, which in most cases would be a Union, to "be the exclusive elected representatives of all the employees in that unit for the purpose of collective bargaining." It is the Union alone that has the right to bargain with management on these broad policy issues. *May Department Stores Co. v. N. L. R. B.*,

---

[5] The plaintiffs' original complaint in paragraph 5 (d) claims that plaintiffs were not paid in full for the vacation credits that they were entitled to under the agreement. They would clearly have a right to sue for these benefits after processing their claim through the grievance procedure set up in the agreement. However, the Company's refusal to process this issue might excuse the employees from exhaustion of the grievance procedure set up in the agreement. *United Steelworkers of America v. American International Aluminum Corp.*, 334 F. 2d 147 (5 Cir. 1964).

We are, however, assuming that plaintiffs have abandoned or waived this issue of accrued vacation pay because no relief was sought in connection therewith or monetary damages claimed.

326 U. S. 376 (1945). Any failure to discuss these matters according to the contract is a violation of the collective rights of the entire unit and not of the personal rights of the individual members. In absence of contrary contractual provisions, it does not appear that the individual employees have a vested interest in the Company's operation being conducted in St. Charles, and, therefore, under the circumstances the Company may close the St. Charles operation completely and relocate elsewhere as its economic judgment dictates without incurring individual liability to each of its employees. *Oddie v. Ross Gear and Tool Company,* 305 F. 2d 143 (6 Cir. 1962), cert. denied 371 U. S. 941.

Even were we to assume that appellants have standing to prosecute this action, we do not believe the agreement entitles appellants to the relief they are seeking. There are two reasons for our belief. One, the agreement does not compel the Company to arbitrate any issue, and two, the agreement does not make this an arbitrable type of issue.

Turning to the agreement in question, it contains in Article IV a No Strike Agreement which is the *quid pro quo* for management's obligations under the Agreement. Article III, on the Grievance Procedure, provides in its essential parts for the adjustment of grievances in a limited fashion and provides three steps, as follows:

> "(1) The Union shall be represented in the shop by the Shop Committee to act with the Foreman in trying to adjust any differences that may arise, and commands the Foreman to attempt satisfactory settlement of the grievance;
>
> "(2) If no satisfactory settlement is reached at stage one, the grievance shall then be considered by the employee, two Shop Committeemen from his shift, plus the Chief Committeeman and the Divisional Su-

perintendent or his representatives, who shall attempt to settle the grievance. The Company shall designate one of its representatives on each shift to discuss and settle any controversy or any grievance that may arise from time to time;

"(3) If no settlement is reached, the grievance shall be reduced to writing and considered by the parties above named, plus the business representative designated by the Union and a representative or officer of the Company. *If they are unable to settle the matter, they shall diligently and in good faith explore some other method for the final disposition thereof.*" (Emphasis supplied.)

There is no agreement contained within the collective bargaining contract to submit any question of interpretation of the contract to arbitration, nor is there any agreement to settle disputes thereunder by submission to an arbitrator or some other board.

The cases of which we are aware clearly allow the specific enforcement of an agreement to arbitrate and compel implementation of an arbitration award. *Textile Workers Union of America v. Lincoln Mills of Alabama*, supra; *Smith v. Evening News Association*, supra; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *Builders Association of Kansas City v. Greater Kansas City Laborers District Council*, 326 F. 2d 867 (8 Cir. 1964), cert. denied 377 U. S. 917; *Minnesota Joint Board v. United Garment Mfg. Co.*, 338 F. 2d 195 (8 Cir. 1964); *United Brick & Clay Workers v. A. P. Green Fire Brick Co.*, 343 F. 2d 590 (8 Cir. 1965); *Fibreboard Paper Products Corporation v. East Bay Union of Machinists*, 344 F. 2d 300 (9 Cir. 1965), cert. denied 382 U. S. 826.

Appellants herein, however, are not seeking the specific enforcement of a compulsory arbitration contract. They

are seeking the specific enforcement of the general agreement to discuss grievances. Unlike the cases cited above, the equity powers of the Federal courts should not be used to specifically enforce a contract under § 301 that merely requires the parties to discuss their differences. It thus appears that there is a fatal defect in the collective bargaining agreement, itself, in that there is no provision for compulsory arbitration, whch would be the only method of finally settling disputes thereunder, absent agreement and absent submission to the courts. Therefore, we believe that a binding agreement to submit a dispute to arbitration or a final and binding arbitration award is a predicate to granting the kind of relief plaintiffs are seeking under § 301. See, *General Drivers etc. Union No. 89 v. Riss & Company, Inc.*, 372 U. S. 517 (1963).

The second reason why plaintiffs could not be afforded relief under this contract is that the grievance procedure set out in the contract does not cover this type of dispute. It is true that *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) provides, at page 578, that the collective bargaining agreement is more than a contract, "* * * it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." And at page 581:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement."

Nonetheless, we think it is patently clear that the renegotiation of a new contract or policy questions on plant relocation could not be settled by the foremen or any representative of the Company appointed to hear individual grievances as contemplated by the procedure

set up in this agreement. It is obvious that the grievance machinery set up in the contract was intended to cover day-by-day disputes involving working conditions, safety hazards, etc. Bargaining over broad questions of policy is vested solely in the Union. *May Department Stores Co. v. N. L. R. B.*, supra. Construing the collective bargaining agreement most liberally, the type of grievance here pled, a plant relocation upon termination of a collective bargaining agreement, is in no way contained within the framework of the agreement. The employer has no duty to arbitrate issues that it has not agreed to arbitrate and whether arbitration is required under the collective bargaining agreement is a legal issue for the Court to decide. See *John Wiley & Sons, Inc. v. Livingston*, 376 U. S. 543, at page 547.

We, therefore, agree with the District Court, that the complaint fails to state a claim upon which the District Court could grant relief.

There are serious questions of whether the Union suit is *res judicata* on the issue here involved, and also whether or not the doctrine of laches should be applied. Inasmuch as these questions are not necessary for determination of the case, we will not attempt to deal with these problems in this opinion.

We affirm the District Court in granting judgment against plaintiffs. This disposition of the case renders unnecessary discussing the relief requested.

Judgment affirmed.

APPENDIX B.

Petition for Rehearing.

(Filed on .... September, 1966.)

The appellants respectfully petition this Honorable Court for a rehearing of the appeal in this cause, and in support of this petition represent to the Court as follows:

Appellants reserve their argued position as to each of the points of appeal. In this petition appellants address themselves solely to those features of this Court's decision wherein they believe that the Court may be convinced that the result herein is based upon an erroneous application of certain relevant facts and controlling matters of law.

Appellants respectfully request the Court to re-consider its decision in reference to the following facts and the law applicable thereto which were overlooked:

1. The Court consistently classified these plaintiffs merely as "members" of the union and as "individuals" enforcing "individual rights" (Court's Opinion, pages 5, 7, 8 and 9). This erroneous classification overlooks the fact that the named plaintiffs were "members of the employees' Shop Committee created under the agreement" (Court's Opinion, page 2). Plaintiff, Holden Brown, was the "Chief Committeeman" of this Shop Committee (R. 4, Complaint, Paragraph 2 (d).). The labor agreement between the parties placed special significance onto this Shop Committee. This Committee **represented the** Union in the Shop (R. 15, Section 2; R. 16, Section 6, labor agreement). The Committee had the sole right under the first two steps of the Grievance Procedure (R. 15,

Section 3, and R. 16, Section 4), to attempt to settle grievances. These plaintiffs therefore should not be classified as mere members or individuals for the purposes of this litigation. They are the vital "Shop Committee" which must initiate the grievance process (R. pages 37 and 38, Plaintiffs' Affidavit).

2. The labor agreement between the Company and Union expired on February 28, 1963, and was not renewed (Court's Opinion, pages 2 and 3). This finding raises the issue of what rights survived and whose rights were they? Only these employees had surviving rights. The class represented by these plaintiffs had surviving rights under the Grievance Procedure (R. 15, Article III); to Seniority claims (R. 17, Article V with recall privileges as set out in sub-paragraph (f), R. 19 and 20); Vacation Pay claims (R. 24 and 25, Article IX) and Health Insurance and Pension claims (R. 25 and 26, Articles X and XII). This Court previously cited, with approval, the excellent analysis of rights which survive the termination of a labor agreement in the opinion of District Judge Parsons in the case of Piano and Musical Workers Union v. W. W. Kimball Company, 221 F. Supp. 461, N. D. Illinois. This authoritative citation of the Piano Workers case was in the landmark decision of this Court outlining rights which survive a labor agreement expiration in the case of Minnesota Joint Board, etc., v. United Garment, etc., 338 F. 2d 195 at 201.[1] Another thorough analysis of the capacity of these plaintiffs to bring this action and their right to

[1] The District Court decision in the Piano Workers case was dated September 13, 1963. This decision was overruled by the Seventh Circuit Court of Appeals in its opinion dated June 30th, 1964 (333 F. 2d 761). This Court, however, obviously preferred the holding of District Judge Parsons by authoritatively citing his opinion on November 9, 1964, in the Minnesota Joint Board decision. The United States Supreme Court clearly supported this stand when it reversed the Seventh Circuit Court of Appeals and reinstated the decision of Judge Parsons on December 14, 1964 (379 U. S. 357; 85 S. Ct. 441 (1964)).

the relief which they seek is outlined in the case of Serra v. Pepsi-Cola Bottlers, Inc., 248 F. Supp. 684.

(a) This Court has found that the "Plaintiffs have abandoned or waived" the issue of accrued vacation pay (Court's Opinion, page 8, ft. nt. No. 5). This finding overlooks the fact that Plaintiffs' Complaint stated that the defendant failed and refused to bargain with the plaintiffs in violation of the labor agreement over this grievance (R. 6, paragraph 5, and 5 (d)), and plaintiffs prayed for relief in the form of Judgment against the defendant that it "be ordered to commence to attempt a satisfactory settlement of the **various grievances** alleged herein" (R. 8, subparagraph (b)).

(b) The Court finds on page 11 of the opinion that it cannot "specifically enforce a contract under Section 301 that merely requires the parties to discuss their differences". This finding, as it relates to all of the issues raised for reconsideration in this petition, overlooks the fact that the Grievance Procedure clause in this labor agreement is exactly what these parties bargained for. The Grievance Procedure does not rule out arbitration as an ultimate method of settling the "differences", "grievances" or "any controversy" that may arise (R. 15 and 16, Grievance Procedure). The Grievance Procedure clause clearly states in Section 5 (R. 16), that "If they are unable to settle the matter, they shall diligently and in good faith explore some other method for the final disposition thereof." This sentence would compel the parties to consider (and probably resort to) arbitration if all prior adjustment, consideration and discussion (paraphrasing the words of the Grievance Procedure clause), in attempting settlement should fail (General Drivers Union v. Riss Co., 372 U. S. 517, 83 S. Ct. 789 at 791).

3. The entire thrust of this Court's Opinion totally overlooks the teaching of the United States Supreme Court that the facts in this case of plant relocation with loss of employment to these plaintiffs are such to compel mandatory (statutory) bargaining by this defendant before it can so drastically affect the "terms and conditions of employment" of these plaintiffs. (Fibreboard Paper Products v. N. L. R. B., 379 U. S. 203, 85 S. Ct. 398 (1964)); Fibreboard Paper Products v. East Bay Union of Machinists, 344 F. 2d 300, cert. den. 86 S. Ct. 61; Local #24 Teamsters v. Oliver, 75 S. Ct. 297; Textile Workers Union v. Darlington Mfg. Co., 85 S. Ct. 994 (1965). The Supreme Court teaching in these cases is exemplified in the following excerpts from an article in 18 Vanderbilt Law Review 1588 (October 1965), "Labor-Law—Failure to Bargain—Employer Required to Bargain With Respect to His Proposal to Contract Out Work":

(a). At page 1592—"The Court did not rely upon precedent in reaching its decision (in Fibreboard), although it did cite with approval the Timken and Oliver cases, and stated that it agreed with the holding in these cases that 'such a matter is subject to mandatory bargaining'."

(b). At page 1595—"An important secondary aspect of the instant case (Fibreboard) is the impact it may have on an arbitrator's decision as to the right of a Company to 'contract out' during the life of an agreement. While this is a complex question the answer seems to be that the decision of the arbitrator should be no different after Fibreboard than before, assuming identical facts. The answer is largely due to the fact that the decision did not change existing law, for as it has been pointed out above, the law prior to Fibreboard was that 'contracting out' was a subject for mandatory bargaining. (Footnote #47—citing Feller and Fairweather.

The Fibreboard Decision and Subcontracting: Two Views, 19 Arb. J. (n. s.) 70 (1964). This article contains an excellent and complete discussion of the instant case.)''

Appellants cite these two excerpts to point up that the failure and refusal of the Company to bargain with these employees can and does constitute a breach of the statutory as well as the contractual rights of the employees. This Court specifically reiterated the unassailable fact in this case that "the plaintiffs, as members of the Shop Committee, attempted to bargain with the Company respecting its intention to re-locate its plant, This attempt to bargain was before the agreement had expired, but the Company refused to so bargain'' (Court's Opinion, page 3). Didn't this refusal of the Company constitute a dispute or difference between the Company and its Shop Committee during the life of the agreement? Aren't these plaintiffs ("individual employees" included) compelled to "attempt use of the contract grievance procedure agreed upon by the employer and union as the mode of redress"? (Republic Steel v. Maddox, 85 S. Ct. 614 at 616, I.). Haven't these plaintiffs been abandoned by their union (Court's Opinion, page 3), which "only perfunctorily" (Maddox Opinion, page 616), pressed their claim?[2] Doesn't the broad form, mandatory Grievance Procedure (R. 15, 16 and 17) clearly cover submission of "any difference that may arise;" "any controversy or

[2] The union's bizarre conduct in this case serves only the purpose of eradicating the defenses of laches and res judicata (Court's Opinion, pages 12 and 13). The Company was sued by the Union ten months after the re-location of the plant (Court's Opinion, pages 3 and 4). The dismissal of the Union's suit was followed seven months later with this litigation (R. Docket Entries). The Company could never prove laches inasmuch as it was only free from litigation over its decision to shut down for a period of seven months. The Company never recognized these plaintiffs as parties to the Union's suit thus barring the defenses of res judicata (R. 47, 48, Paragraph 8 of Company's pleaded Answer to Union's Complaint).

grievance that may arise from time to time"? Appellants are at a loss to understand how this Court found any basis in the facts or the law of this case to assert that "the individual would have no standing to compel discussion of broad collective bargaining principles such as the re-negotiation of a new contract or the re-location of a plant" (Court's Opinion, pages 8 and 9); or further, "there is no agreement contained within the collective bargaining contract to submit any question of interpretation of the contract to arbitration" (Court's Opinion, page 10); or further "that the grievance procedure set out in the contract does not cover this type of dispute" (Court's Opinion, page 11); or further that "It is obvious that the grievance machinery set up in the contract was intended to cover day by day disputes involving working conditions, safety hazards, etc." (Court's Opinion, page 12). These frankly amazing findings are made in the teeth of a grievance clause that obviously includes everything, excludes absolutely nothing and is mandatory in every sense of its wording.

4. Appellants' final contention in this petition is a total disagreement with the applicability of the facts of this case to the cases of May Department Stores v. N. L. R. B., 326 U. S. 376 (1945); 66 S. Ct. 203 (Court's Opinion, pages 9 and 12); and Oddie v. Ross Gear, etc., 305 F. 2d 143 (6th Cir. 1962), cert. den. 371 U. S. 941 (Court's Opinion, page 9). Appellants will treat the misapplication of these cases separately. However, the Supreme Court ruling in Republic Steel v. Maddox clearly and specifically reserved to individuals the right to assert contract grievances under defined circumstances (85 S. Ct. at 616 and 617; I. and 619, III):

> (a) The 1965 Republic Steel v. Maddox decision clarifies exceptions to the general rule of May Co., (supra) enunciated twenty-one (21) years ago. There is no reasonable comparison between the facts of the

May Co., decision and the facts of this case. Especially is this true when the cases are compared on the further qualification that these appellants have been abandoned by their Union (R. 49-50), and the contract had been allowed to expire (Court's Opinion, pages 2 and 3).

(b) The holding of the Sixth Circuit in Oddie v. Ross Gear (supra), has been frequently directly and indirectly compared to the holding of the Court of Appeals and the District Court in the Second Circuit case of Zdanok v. Glidden, 181 F. Supp. 441, reversed 288 F. 2d 99 (limited certiorari, U. S. Supreme Court 82 (a), S. Ct. 1459); Second District Court trial, 216 F. Supp. 476, 327 F. 2d 944, cert. den. 84 S. Ct. 1338. The applicability of Zdanok v. Glidden (supra), rather than Oddie v. Ross Gear (supra), to the facts of this case are best outlined in the following cases:

1. Piano Workers Union v. W. W. Kimball Co., 221 F. Supp. 461 (the opinion of District Judge Parsons highlighted in footnote No. 1, page 20 of this petition).

2. John Wiley, etc. v. Livingston, 313 F. 2d 52 at 58 and 59 (footnote No. 4), 84 S. Ct. 909.

3. Zdanok v. Glidden, 216 F. Supp. 476 at 478 and 479 (Second District Court decision).

Appellants respectfully submit that each of the three (3) above cited decisions were written and published **after** the Oddie v. Ross Gear (supra), decision.

In conclusion, appellants urge that all other findings in this Court's Opinion herein pose questions of "procedural arbitrability". These "procedural disputes relating to arbitrability are for the arbitrator, not the court to decide" (Local Union No. 51, etc. v. Illinois Power Co., 357 F. 2d 916 (1966) at 918 and 919). The

dispute settlement forum to which these parties are contractually bound must itself resolve what grievances these parties will attempt to satisfactorily settle and diligently and in good faith explore the "method for the final disposition thereof" (R. 16, Grievance Procedure, Section 5). The orders of this Court are necessary to put this machinery into motion.

For all of the foregoing reasons the appellants respectfully pray that this petition for rehearing be granted.[3]

.....

Jerome J. Duff,
Suite 1155—818 Olive Street,
St. Louis, Missouri 63101,
314-MAin 1-3833,
Attorney for Appellants.

---

[3] Appellants call to the Court's attention that this case is companion in some respects, to the case of Woody et al. v. Sterling Aluminum Co., No. 18,083. The opinion of Judge Mehaffey of this Court in the Woody case was published on September 2, 1966. The Woody Opinion specifically refers to the decision in this case (Woody Opinion, pages 11 and 12, footnote No. 8). This Court has ordered the time extended to file a petition for rehearing in the Woody case until October 4, 1966. The Woody petition for rehearing will be filed on or before that date. Appellants respectfully urge that this Court also consider the Woody case petition for rehearing in those areas where the rulings are similar to the existing rulings in this case. Appellants also respectfully urge consideration of this petition and the forthcoming Woody petition by the Court en banc in accord with Rule 15 (e) of this Court.

United States Court of Appeals
For the Eighth Circuit.

September Term, 1966.

No. 18,218.

Holden Brown, et al., Appellants, v. Sterling Aluminum Products Corporation.	Appeal from the United States District Court for the Eastern District of Missouri.

There is before the Court appellants' petition for rehearing en banc and on consideration of such petition, it is the order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

October 7, 1966.

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	3
Argument	7
I. No violation of plaintiffs' rights arising out of contract (as distinguished from other rights such as those arising out of Title 29 USCA, §§ 158 and 159) is here involved and therefore the District Court had no original jurisdiction to entertain the suit below	7
II. A. The Courts below did not err in holding that respondent's closing of the plant at St. Charles was entirely outside the ambit of the grievance provision in the particular contract here involved	11
II. B. The Courts below did not err in holding that, under § 301, the District Court has no power to "fashion a remedy" to cause respondent to conform to the last step in the grievance procedure here, which did not provide for a reference of a dispute to a third party or parties or any other authority for making a final and binding decision in the matter	15
Conclusion	16
Appendix—Opinion of the District Court below in this case	19

CITATIONS.

Cases.

Brown v. Sterling Aluminum Products, Inc., 365 F. 2d 651, 246 F. Supp. 279 1

Republic Steel v. Maddox, 379 U. S. 650, 13 L. ed. 580, 85 S. Ct. 614 (1965) 8, 10, 13

United Steel Workers of America v. American Mfg. Co., 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343 (1960) 16

Zdanok v. Glidden Co. (first), 288 F. 2d 99 (2d Cir., 1961) 14

Zdanok v. Glidden Co. (second), 327 F. 2d 944 (2d Cir., 1964) 14

Statutes.

Act of June 25, 1946, c. 646 (1); 62 Stat. 928 (1); Title 28 USCA, § 1254 1

§ 301, Labor Management Relations Act, 61 Stat. 156, Title 29, USCA, § 185 ..... 2, 7, 10

National Labor Relations Act, Title 29, USCA, §§ 158 and 159 7

Texts.

17 Am. Jur. 2d, **Contracts**, § 26 16

1 Williston, **Contracts**, 3d ed., § 45 16

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 937.

HOLDEN BROWN, GEORGE HOUSE, and GEORGE WOLFF,
Petitioners,

vs.

STERLING ALUMINUM PRODUCTS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Eighth Circuit in this case is reported at 365 F. (2d) 651, and is also set forth as Appendix A to the Petition for Writ of Certiorari.

The Opinion of the District Court is reported at 246 F. Supp. 279 and is set forth as an Appendix to this Brief and it also appears in the Record at pages 51-59.

JURISDICTION.

The Act of June 25, 1946, c. 646 (1), 62 Stat. 928 (1), Title 28 USCA, § 1254, is invoked by Petitioners in applying for the writ of certiorari in this case.

Section 301 of the Labor Management Relations Act, 61 Stat. 156, Title 29 USCA, § 185, is invoked by the Petitioners as conferring jurisdiction over their action in the United States District Court for the Eastern District of Missouri. However, the Respondent respectfully suggests that since no labor contract violation, nor any contract right of these plaintiffs is involved, the District Court had no jurisdiction over Petitioners' action, a point discussed in our Argument Point I below.

QUESTIONS PRESENTED.

I. The Supreme Court can never reach the "questions presented" (as set forth by Petitioners) because there is here no breach of contract or infringement of Plaintiffs' contract rights to give the District Court jurisdiction under § 301 of the Labor Management Relations Act, 61 Stat. 156, 29 USCA, § 185.

II. Since the "questions" must arise out of the record and not out of thin air, Petitioners' formulation of them should be revised to read:

1. Did the courts below err in holding that Respondent's closing of the St. Charles plant was a matter entirely outside the ambit of the grievance provisions of the particular labor contract and that, for this reason, among others, the affected employees could not obtain a decree ordering the matter to be processed as a grievance?

2. Did the courts below err in holding that under § 301 the District Court should not fashion a remedy requiring Respondent to conform to the last step of the grievance procedure, which directed only that the parties "diligently and in good faith explore some other method for final disposition" (thus providing only for voluntary composure and not for binding resolution of grievances)?

STATEMENT.

This case was decided by the District Court's sustaining (R. 50; opinion at R. 51, 246 F. Supp. 279, Appendix A to this Brief) the Motion to Dismiss (R. 39) filed by Respondent (herein for clarity, sometimes referred to as "Sterling"). Hence, for present purposes the facts are those properly alleged in the pleadings below.

Sterling operated plants in several states including one at St. Charles, Missouri (R. 5). At St. Charles, Sterling had a labor contract with Local 59, International Molders and Foundry Workers Union, which recognized the Union as the bargaining agent for "employees in the Foundry Department **at the St. Charles plant.**" (Emphasis supplied.) (R. 4-5, 9 ff.)

By giving 60 days' notice, Sterling duly terminated the labor contract at its contemplated expiration on February 28, 1963 (R. 27, 43, 46); and on that date, pursuant to information previously given to its employees and the Union, Sterling closed the St. Charles plant, terminated the employment of all persons who worked there, and moved the operation to Malden, Missouri (R. 2, 47).

The Union is **not** a party to this suit. The plaintiffs herein are three erstwhile employees in the Foundry Department, who were members of the Union and constituted its Shop Committee; one of them, Brown, was Chief Committeeman (R. 4). (In their Complaint, plaintiffs offer to allow other former employees to join as plaintiffs by becoming parties and sharing the expense (R. 4), but no others have joined.)

Plaintiffs allege that they (not the Union) requested Sterling to bargain with them over Sterling's intention to close the plant and to terminate the workers, but that Sterling refused (R. 5). Plaintiffs claim that this refusal

constituted a breach of the grievance provisions[1] of the contract (R. 5-6, R. 15 ff.), which procedure calls for:

> First step: Settlement effort by the employee (or one representative of employees if more than one be involved), two shop committeemen from his shift, the chief committeeman (if needed), meeting with the foreman.
>
> Second step: Further effort by the foregoing, plus the chief committeeman, meeting with the divisional superintendent of the employer or his representative.
>
> Third step: Further effort by the foregoing persons *PLUS* the business representative of the Union meeting with a representative or officer of the Company. "If they are unable to settle the matter, they shall diligently and in good faith explore some other method for the final disposition thereof" (R. 16).

No unfair labor practice charge was ever filed with the NLRB. Moreover, this lawsuit was not filed until two years after the St. Charles plant closed (R. 1). In the meantime, almost 10 months after the plant closing, the Union on its own behalf and on behalf of its members had filed a federal court suit against Sterling, claiming damages on the assertion Sterling had moved its plant, laid off its employees and denied recall privileges to those who had acquired seniority at the St. Charles plant (R. 41 ff). However, on August 26, 1964, the *Union* by stipulation with Sterling dismissed its suit with prejudice (R. 49-50).

The instant Complaint asks that Sterling be ordered to "commence to attempt" a satisfactory settlement of the grievance by bargaining with the plaintiffs (R. 8); and

---

[1] Other contract violations are inferentially alleged in the paragraph 5 (a), (c), (d), and (e) of the Complaint (R. 6.), but no review of the dismissal as to them is sought in the Petition.

asks that in the meantime Sterling be ordered to pay back pay and continue wage payments to the plaintiffs during the bargaining (R. 8). By their subsequent motion for partial summary judgment, plaintiffs asked that Sterling be required to post bond for $1,815,000, representing an asserted half of the back wages claimed (R. 34-37).

The District Court, on Respondent's motion, dismissed the Complaint for failure to state a claim upon which relief could be granted (R. 54; 246 F. Supp. 279 at 282, Appendix A to this Brief).

As grounds for his decision, District Judge Regan held that plaintiffs lacked the standing to sue, because whatever rights they were asserting under the contract were not "uniquely personal"; that specific performance would not be granted where the parties in their contract had not agreed on a binding method for finally resolving grievances; that the dispute was not one within the ambit of the grievance clause of the contract, but rather one concerning basic company policy; that the closing of the plant followed termination of plaintiffs' employment, so they could not have a grievance about it; that the Court could not compel Sterling to bargain with plaintiffs about closing of the plant, because the UNION was by law the exclusive collective bargaining agent, and also, obviously, because a refusal to bargain is matter for the National Labor Relations Board and not for the District Court; and that due to *laches* "a fundamental change in the relationship of the parties" had occurred which would make the requested discussion "pointless".

The Court of Appeals below (365 F. 2d 651) affirmed the District Court, holding that the District Court had no jurisdiction under § 301, because plaintiffs were not seeking to enforce a right personal to them and vested in them at the time of suit; and holding further (even if, *arguendo*,

the District Court be assumed to have jurisdiction) that plaintiffs were not entitled to relief because (a) the labor contract does not provide a method for dispute resolution warranting specific enforcement and (b) the grievance procedure set out in the contract "does not cover" the type of dispute (refusal to bargain) involved in this case.

ARGUMENT.

I.

THE DISTRICT COURT HAD NO JURISDICTION UNDER § 301 BECAUSE THE ALLEGED REFUSAL TO BARGAIN IS NOT A CONTRACT VIOLATION AND, FURTHERMORE, COULD NOT CONSTITUTE A BREACH OF CONTRACTUAL DUTY TO THESE PLAINTIFFS TO GIVE THEM THE STANDING TO SUE.

The United States Courts have no jurisdiction over the subject matter of this case, a contention made by Respondent throughout this litigation since its inauguration. It was first raised by Respondent's Motion to Dismiss (R. 39) and was sustained by the decision in the District Court (R. 50-59, 246 F. Supp. 279) and the Court of Appeals (365 F. 2d 651 and the Appendix A to Petition herein, pp. 7-18).

The Petitioners' action was an original suit asking for a decree of specific performance of a **labor contract,** alleging a breach of Plaintiffs' rights thereunder by the employer; and it was brought, purportedly under § 301 Labor Management Relations Act, Title 29, U. S. C. A., § 185, and the National Labor Relations Act, Title 29, U. S. C. A., §§ 158 and 159.

(The last two sections (158, 159) cited by the Petitioners (R. 4) have nothing to do with jurisdiction of the federal courts over original actions. Instead they point the way to a conclusion that what is complained of is at best a matter within the sole and exclusive original jurisdiction of the National Labor Relations Board.)

Section 185 (also referred to by the Courts as § 301) does confer upon the Federal District Courts jurisdiction

over original suits (regardless of citizenship or amount in controversy) for the violation of labor contracts (which the action below was not) when asserted by parties whose contractual rights have been violated (which is not the case here).

Our contentions and these decisions below were unquestionably sound and in no wise conflict with any applicable decision of the Supreme Court or of any Court of Appeals.

Particularly, there is no conflict between the decisions below and the decision of the Supreme Court in *Republic Steel v. Maddox,* 379 U. S. 650, 13 L. ed. 580, 85 S. Ct. 614 (1965).

Republic Steel v. Maddox, supra, was a State Court action for severance pay allegedly due under specific provisions of a labor contract giving rise to uniquely personal rights. The United States Supreme Court in that case denied the employee recovery, not for lack of a contract violation personal to the employee, but because the employee should have utilized the grievance procedure provided in the contract there.

Here the Respondent's plant was permanently closed at the end of business on February 28, 1963 (R. 7, 43) when the contract expired (R. 5, 27). All the employees, including those in the Petitioners' (Foundry) department were terminated at that time and the employer's Foundry operation moved to another part of the state (R. 43-44). These things were done only after timely notice to all employees in the Unit and to their Union (R. 5-6, 43).

The contract here contained no prohibition of such of the employer's conduct as is here complained of. The representation of the Union was limited by the Contract (R. 9) to a unit restricted to the Foundry Department workers at the St. Charles Plant and the Union did not represent Respondent's employees at any other location.

There was no provision in the contract against the employer shutting down, against moving, against contracting out, or for severance pay in any event.

As is apparent from the Record, the closing of the St. Charles Plant occurred at the expiration of the contract.

So the employer was not obligated by the **contract** to continue operation of the Foundry Department after February 28, 1963, at St. Charles or anywhere else. It was not bound by its **contract** to negotiate a new contract with the Union. It was not bound by its **contract** to continue the employment of the workers in the Foundry unit after February 28, 1963.

Whatever duties or obligations rested upon the employer in these respects (to discuss the plans for shutdown, to keep the St. Charles plant in operation after the expiration of the term of the contract, to negotiate a new contract, or to continue the employment at St. Charles or anywhere else of former workers who had been in the unit represented by the Union) would be, arguably, duties or obligations imposed by **statute** and not by **contract.**

The question of "unfair practices" under the statute is not before the Court because, as the Court of Appeals properly held:

> "The National Labor Relations Board has the sole and exclusive jurisdiction to determine whether the Company's actions violated their duties under the Act and the Courts have no original jurisdiction to make such a determination" (365 F. 2d 651, 656, Appendix A to Petitioners' Brief, p. 13).

The Petitioners have cited no decision of the United States Supreme Court that is in conflict with this principle which governs this case.

It is true that where the complained of conduct of the employer constitutes **both** an unfair labor practice **and** a violation of the collective bargaining agreement, the dis-

trict court's original jurisdiction under Section 301 (Title 29, U. S. C. A., § 185), cannot be successfully challenged and the cases noticed by the Court of Appeals in its opinion (365 F. 2d 651, 656, Appendix A to Petition, p. 13) may be cited to support such jurisdiction.

However, the **facts** in the case at bar fail to meet the test of those decisions for, as the District Court and the Court of Appeals observed in this case, to support the jurisdiction over original suits there must be presented "rights secured under a collective bargaining agreement". In those other cases redress was sought for a "breach by the Company that occurred during the term of the Agreement".

Since there is present in this record no question of contract violation, the decisions in the District Court and in the Court of Appeals were not in conflict with *Republic Steel Corp. v. Maddox*, supra.

It is significant also that the Court of Appeals here held that the employees did not have

> "a vested interest in the Company's operation being conducted in St. Charles and therefore under the circumstances the Company may close the St. Charles operation completely and relocate elsewhere as its economic judgment dictates without incurring individual liability to each of its employees." 365 F. 2d 651 at 657; Petition, p. 15.

It follows that the district court did not have jurisdiction under § 301, because:

> ". . . for an individual to bring an action under § 301 he must be seeking to enforce a right that is personal to him and vested in him at the time of the suit. *Humphrey v. Moore*, 375 U. S. 335 (1964) . . . However, whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the

> Union as the sole representative of that unit would normally have the standing to enforce that right . . . It is the Union alone that has the right to bargain with management on these broad policy issues. *May Department Stores v. N. L. R. B.*, 326 U. S. 376 (1945). Any failure to discuss these matters according to the contract is a violation of the collective rights of the entire unit and not of the personal rights of the individual members." (365 F. 2d 651 at 657; Petition, pp. 14-15.)

Thus, whether the question is one of lack of any contract violation or of lack of a contract duty to these Plaintiffs, the District Court was without jurisdiction, both because there was no breach of contract at all and no contractual duty to these plaintiffs. Indeed the very "grievance" procedure which these plaintiffs seek to enforce requires the presence of the union business representative for the last step—and the union, as we have remarked, is not in this lawsuit.

Therefore, we respectfully submit that the Petition for Certiorari should be denied for lack of federal court jurisdiction over the action below.

II.

PLAINTIFFS ARE NOT ENTITLED TO A DECREE OF SPECIFIC PERFORMANCE BECAUSE:

A. CLOSING AND REMOVAL OF THE PLANT AT ST. CHARLES, AFTER THE EXPIRATION OF THE LABOR AGREEMENT, WERE MATTERS ENTIRELY OUTSIDE THE AMBIT OF THE CONTRACT AND ITS GRIEVANCE PROCEDURE.

As stated above, what the petitioners are seeking is a decree compelling the employer to discuss with them broad policy matter such as an agreement not to move the plant, and the negotiation of a new contract for St. Charles.

Any failure or refusal to discuss such questions might arguably be a violation of the statutory rights of all members alike but certainly not a violation of the personal contractual rights of individual members.

It is clear from a reading of the Grievance Procedure provisions of the contract here that they were designed to cover day-by-day questions of practice such as working conditions, risk of hazards and the like.

It is altogether unlikely that the union and the employer, in establishing the machinery for settling disputes over grievances, intended to delegate to a shop committee on a shift, on the one hand, and a foreman, on the other hand, authority to discuss and agree upon such matters as closing the entire department, terminating all the employees therein, and moving the entire operation to another part of the state.

Yet that is "the first step" in the grievance procedure, which would be handled by the employee (or one representative of the employees if there be more than one involved), two shop committeemen from his shift plus the chief committeeman, if needed, on the one hand, and the foremen on the other (R. 15).

Then, if no settlement is reached, the panel is to be augmented by the "chief committeemen and the divisional superintendent or his representative" (R. 16).

Then "if no settlement is reached, the grievance shall be reduced to writing" and the panel further augmented by the addition of "the business representative designated by the union and a representative or officer of the company" (R. 16).

As the third and last step an augmented panel has the duty further to consider the matter and if they cannot agree "they shall diligently and in good faith explore some other method for the final disposition thereof" (R. 16).

The Court of Appeals properly decided that the union and the employer never intended to submit to such a panel and such procedure the negotiation and decision of broad questions of policy affecting alike all members of the unit involved in the question of closing the plant upon expiration of the contract and establishing the operation at a new location in another part of the state.

As we have pointed out there is no conflict between the Court of Appeals holding on this question and *Republic Steel v. Maddox,* supra, where there was a specific provision of the contract for severance pay for Maddox which he sought to enforce under Section 301, and not as here a broad policy decision to decide only through bargaining between the union and the employer.

In any case it would be the union, and not individuals comprising a committee thereof, that would be entitled to represent all the employees in the unit in a dispute involving closing and moving the plant after the expiration of the contract.

The prerogatives of the union, conferred by its status as sole and exclusive bargaining agent, are not to be lightly ignored. The considerations for respecting the Union's status and prerogatives are set forth in *Republic Steel v. Maddox,* supra, 379 U. S. at 653, and are to be recognized here.

The plea of "abandonment" by the union is not only belated but false. It did not even occur to the Petitioners when they filed their Complaint below (R. 3) and later their Motion for Partial Summary Judgment (R. 34).

The first mention of the union's filing and later dismissing a lawsuit was made in the Respondent's motion pleading res adjudicata (R. 40).

The Petitioners now say the suit by the union against the employer was a "friendly suit", but there are no facts

alleged to support an inference that it was anything but an adversary action.

The circumstance that it was by stipulation dismissed with prejudice to the union is no indication that it had been brought without serious intent.

There is no fact alleged by Petitioners or otherwise shown by this record that the Respondent unfairly procured the dismissal.

The Union's lawsuit was brought Dec. 26, 1963, on the theories advanced by the Second Circuit Court of Appeals in the "first" *Zdanok v. Glidden Co.* opinion (288 F. 2d 99, 2d Cir., decided in 1961), but that opinion was overwhelmed by a veritable typhoon of contrary decisions and by inclement criticism, including a disavowal by its own parent, see the "second" *Zdanok* opinion, 327 F. 2d 944, 957, 2d Cir., decided January 29, 1964. Thus, by August 26, 1964, when the Union's suit was dismissed, it was recognized generally by lawyers that the theories of the first *Zdanok* opinion would not support an action such as the Union had brought.

If other reasons motivated the union in dismissing the suit, they do not appear on the record. If there had been any wrongful conduct of the union or the employer in this case, it stands to reason that the Petitioners would have alleged it in their Complaint which was not filed until six months after the union's suit was dismissed.[2]

---

[2] Indeed, Petitioners' attorney, in representing members of another union at Respondent's plant, vigorously alleged wrongful conduct by both their union and Respondent. See *Woody v. Sterling Aluminum Products, Inc.*, 365 F. 2d 448 (certiorari pending, No. 946).

B. THE COURTS BELOW PROPERLY DECLINED TO BE DRAWN INTO INVENTING EQUITABLE REMEDIES WHERE THE PARTIES HAD AGREED NOT TO A BINDING METHOD OF SETTLEMENT BUT ONLY TO EXPLORING MEANS OF FINAL SETTLEMENT.

The Court of Appeals below held that the equity powers of the federal courts should not be used to specifically enforce, under Section 301, a contract that merely requires the parties to discuss their grievances (even assuming *arguendo* that the claimed dispute over closing and removing the plant after the contract has expired, arises out of contract and comes within the ambit of the grievance procedure here.)

Cases are cited (and distinguished) in the Court below, holding that specific enforcement will be decreed (a) to compel arbitration (where the contract provides for arbitration) to finally dispose of a dispute or (b) to compel the payment or other implementation of an arbitration award.

But here no arbitration or other reference to an impartial authority was ever agreed to by the employer. No more than a series of steps for voluntary composure of their differences was provided by the contract in the case at bar.

And no case is cited where a court has "fashioned a remedy" for the mere interlocutory exploration of a means of settling a dispute as the Petitioners demand in the case at bar.

Granted that the union and the employer agreed that they would at sometime in the future "explore some other method for the final disposition" of a grievance; nevertheless, this was at the very best an agreement to ne-

gotiate for an agreement; which is a contradiction in terms and imposes no obligation on the parties thereto. 1 Williston, **Contracts**, 3d ed., § 45; 17 Am. Jur. 2d, **Contracts**, § 26.

Hence we submit that the Court of Appeals rightly ruled, without a shadow of conflict with any decision of the Supreme Court, that the federal courts should not be used to decree merely that discussions be had looking toward a final agreement where no more than a voluntary agreement is provided in the contract as a means for the final determination of disputes. The federal courts are able to avoid being inundated by cases under § 301 only because under the "triad" arbitration decisions[3] most cases are relegated to arbitrators. We doubt that the federal courts, unaided by any administrative agency, want to plunge into quagmire of "good faith bargaining" controversies over contract disputes. Furthermore, in the instant case, which involved company policy rather than a contract grievance, the NLRB was not only available, but was the **only** place where the present complaint could have been heard.

CONCLUSION.

For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL BARTLETT,

WILLIAM STIX,
Counsel for Respondent, Sterling Aluminum Products, Inc.

January .., 1967.

---

[3] *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343 (1960); and companion cases.

Certificate of Service.

State of Missouri, }
City of St. Louis. } ss.

I, Daniel Bartlett, one of the counsel for the Respondent herein, and attorney of record for the Respondent below, being duly sworn, say that on January 26, 1967 I served four copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari, on the Petitioners, as required by the Rules of the Supreme Court of the United States by personally mailing such copies to Jerome J. Duff at his office in Suite 1155, 818 Olive Street, St. Louis, Missouri 63101, Attorney for the Petitioners.

Daniel Bartlett,
Member of the Bar of the United States Supreme Court.

APPENDIX.

Holden Brown, George House, and George Wolff

v.

Sterling Aluminum Products Corporation, a Corporation.

No. 65 C 61 (3).

United States District Court, E. D. Missouri, E. D.

Aug. 18, 1965.

Regan, District Judge.

This action, filed February 25, 1965, against Sterling Aluminum Products Corporation (Sterling) by three former employees seeks specific performance and related relief, alleging that Sterling breached a labor agreement. Sterling has moved to dismiss the complaint, setting forth a number of grounds. Plaintiffs have moved for a partial summary judgment. Both motions have been submitted and are now before the Court for disposition. Jurisdiction is asserted under § 301 of the Labor Management Relations Act, 29 U. S. C. A., § 185, and the National Labor Relations Act, 29 U. S. C. A., §§ 158 and 159.

The action purports to be brought by plaintiffs "as a bargaining committee as well as for the benefit of themselves as individuals and all persons whose rights are similarly affected who may become parties."

The following facts are alleged in the complaint:

1) International Molders and Foundry Workers Union, Local 59 (Molders Union), of which plaintiffs are members, was at all relevant times the duly certified and recognized "labor relations bargaining agent" of plaintiffs.

2) Sterling operates manufacturing plants in Indiana, Illinois, Michigan, and Missouri, and formerly operated

a plant in St. Charles, Missouri, where plaintiffs were employed "through and until February 27, 1963".

3) The Molders Union, as bargaining representative of plaintiffs and other workers employed in the Foundry Department of Sterling's St. Charles plant entered into a collective bargaining agreement with Sterling on April 7, 1961, effective as of March 1, 1961, and which by its terms was to "remain in effect for two years, that is, through February 28, 1963", which was designated the "expiration date".

4) Plaintiffs were at all relevant times the duly elected Chief Committeeman and Shop Committeemen of all Molders Union employees at Sterling's St. Charles plant.

5) Sterling has refused to bargain with plaintiffs "regarding the planning and preparation to close its plant in St. Charles and its actions in closing the said plant". This refusal to "bargain" is alleged to be in "direct violation" of the labor agreement between Sterling and the Molders Union, and plaintiffs are alleged to be "the only qualified persons to commence Grievance Procedures in behalf of Plaintiffs as these procedures are set out in the labor-agreement (Exhibit 'A', Article III, Grievance Procedure, Sections 2, 3, and 4)."

The "Grievance Procedure" set forth in Article III of the Molder Union's contract with Sterling is very limited in scope. It provides that "The *Union* shall be represented in the Shop by a Shop Committee to act with the foreman on *their shift* in trying to adjust any differences that may arise;" that "the employee (or one representative of the employees if there be more than one involved), two shop committeemen from *his shift,* plus the chief committeeman, if needed, and the foreman shall attempt a satisfactory settlement of the grievance;" that "if no satisfactory agreement is reached, the grievance shall be

considered by the foregoing persons plus the chief committeeman and the divisional superintendent or his representative, who shall attempt to settle the grievance;" that "if no settlement is reached, the grievance shall be reduced to writing and considered by the foregoing persons, plus the business representative designated by the Union and a representative or officer of the Company", and that "if they are unable to settle the matter, they shall diligently and in good faith explore some other method for the final disposition thereof."

This suit was filed two years after Sterling permanently closed its St. Charles plant and long after the foremen, divisional superintendents and other employees had departed from the plant. They may not have "vanished". (Republic Steel Corp. v. Maddox, 379 U. S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580), but they certainly are no longer in existence at this late date within the concept of the grievance procedure clause. The collective bargaining agreement expired by its terms some two years ago.

In this state of facts, what plaintiffs now seek is an order of specific performance directing Sterling to discuss, through its former foremen on each of the shifts formerly operated at St. Charles (and through the former divisional superintendent or his representative on each shift), the decision of the company, made at the management level over two years ago, to close the plant and terminate plaintiffs' employment. Additionally, plaintiffs pray for an order restoring the "status quo ante to February 27, 1963" of plaintiffs employment by requiring Sterling to pay them all wages and contractual benefits (estimated at $150 per week for 100 weeks for each employee) to which they would have been entitled had not their employment been terminated on February 27, 1963, and to continue to make such payments "until such time as the parties have bargained and negotiated a satisfactory settlement of plaintiffs' alleged grievances."

We rule and hold that plaintiffs have failed to state a claim upon which this Court can grant relief.

The parties to the collective bargaining agreement are Sterling and the Molders Union. The Union is not a party to this action. It is brought by individuals alleged to be former employees of Sterling, for their personal benefit. True, plaintiffs allege that they also bring this suit "as a bargaining committee", presumably because they had been shop committeemen in the St. Charles plant, but their former status as such no more entitles them at this time to sue for specific performance than a former foreman or divisional superintendent. Whatever rights have been granted by Article III of the contract (Grievance Procedure) may be enforced only by and against the Union and the Company, not by the representatives of each through whom they are required to act. The very fact that this suit is directed against the Company, not the foreman and superintendent with whom the "bargaining" is sought, evidences plaintiffs' recognition of the real nature of the contractual provision and at the same time points up the lack of standing of plaintiffs to sue.

We find nothing in Smith v. Evening News Ass'n, 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246, or Humphrey v. Moore, 375 U. S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370, which supports the right of these individual plaintiffs to maintain this § 301 action. Those cases, although sustaining the right of an individual employee to sue for a breach of contract, involve rights "uniquely personal". Neither was an action for specific performance. And Republic Steel Corp. v. Maddox, 379 U. S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580, merely held that an employee must afford his *union* the opportunity to exhaust grievance procedures before maintaining an action at law for monetary benefits allegedly due him under the contract. Expressly left open by Smith (and not considered in either Moore or Maddox) was the question of an employee's standing to

sue in *other* types of actions and particularly as to other contract clauses such as the one here involved.

We take particular note of the fact that arbitration is not required by the instant contract, is not requested by plaintiffs, and could not be compelled in any event, even by the Union. Moreover, we also note that the grievance clause contains no specific reference to disputes as to the meaning and application of the contract. Article III pertains to *individual* grievances of a nature which can normally be adjusted at the *shop* level by the foreman on a particular employee's shift, or if necessary by a divisional superintendent. It was not intended to be utilized to process a dispute between the Union (as the representative of all the employees) and the Company concerning decisions of basic company policy made and implemented at the management level.

It is self-evident that no individual foreman on any one shift (or combination of foremen) could overrule the decision of the company management to shut down or relocate a plant. And certainly no former foreman or superintendent would have this authority two years after the plant had been closed and relocated. Any discussion by plaintiffs with the various foremen, either individually or collectively (and there is no basis in the contract for the latter), would necessarily be entirely fruitless, particularly now that two years have elapsed since the permanent closing of the plant and the termination of plaintiffs' employment.

The alleged "grievance" of which mandatory discussion is sought, namely, the closing of Sterling's St. Charles plant, did not come into existence until after the termination of plaintiffs' employment by Sterling. We have not overlooked plaintiffs' allegation that the grievance arose in December of 1962, evidently on the theory that the differences between the parties were created by Sterling's

advance plans and preparations to shut down the plant and terminate plaintiffs' employment. However, only the implementation of these plans and preparations could directly affect plaintiffs or create a "difference" within the meaning of Article III, if that Article would otherwise have application. Inasmuch as plaintiffs' employment terminated on February 27, 1963 (accepting as true, for the purpose of the present motion, the allegations of the complaint), plaintiffs are in no position to complain of the subsequent closing of the St. Charles plant or to seek a discussion thereof with the former foremen on their former shifts.

To the extent that plaintiffs seek an order requiring "bargaining" over the plant closing, as distinguished from a shop discussion of a grievance, this Court has no jurisdiction to grant such relief. That an employer's failure to bargain respecting plant closing or contracting out work may constitute an unfair labor practice in certain circumstances (Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U. S. 203, 215, 85 S. Ct. 398, 13 L. Ed. 2d 233; Textile Workers Union of America v. Darlington Manufacturing Co., 380 U. S. 263, 85 S. Ct. 994, 13 L. Ed. 2d 827), is wholly irrelevant. An employer is obligated to "bargain" on these subjects only with the union or the duly recognized or accredited representative of the employees (May Department Stores Co. v. Labor Board, 326 U. S. 376, 383-384, 66 S. Ct. 203, 90 L. Ed. 145), and not with individual members of the bargaining unit or even a group of such members. In any event, a failure to "bargain" in good faith is at most only an "unfair labor practice", which may be prosecuted only before the National Labor Relations Board.

Also beyond the jurisdiction of this Court to grant is the requested order to restore the "status quo ante" pending the "bargaining" and the resolution of the alleged differences. Plaintiffs have cited Fibreboard, but that

case involves simply the discretionary power of the National Labor Relations Board to fashion remedies, a power which is expressly granted to the Board by § 10 (c) of the National Labor Relations Act, 29 U. S. C. A., § 160 (c). This Court cannot do what the Labor Board may do. We have no jurisdiction over complaints by employees of unfair labor practices.

Of course, the fact that the particular conduct complained of may constitute an unfair labor practice does not affect our § 301 jurisdiction if the conduct is also violative of a labor contract. But in such instances our right to consider the facts and the relief we may grant is limited to the contract and the violation charged. That is, we consider the conduct not as an unfair labor practice but only insofar as it is alleged to be in violation of the collective bargaining agreement.

We have not been cited to a single case which supports the alleged right of plaintiffs to the relief sought in this Court. Specific performance of arbitration agreements has been granted, but the compulsion of arbitration is a far cry from the voluntary composure of the differences by the parties themselves, as contemplated by this contract. Moreover, as we have indicated, by waiting two years after the termination of their employment before bringing this action, plaintiffs are in no position now to seek compulsory discussion with respect to Sterling's decision to close the St. Charles plant. A fundamental change in the relationship of the parties has occurred in the interim which would make the requested "discussion" pointless, even if plaintiffs had standing to obtain such relief.

If plaintiffs are entitled under the contract to employment at any other plant of Sterling, they have a right to assert a claim of that nature, but this is not what they are seeking here. In any event, the agreement, fairly con-

strued, does not give plaintiffs employment rights at other plants. Article I (Recognition) provides: "The Company recognizes the Union as the sole collective bargaining agency for all workers employed in the Foundry Department of the Company's *St. Charles plant* which constitutes the bargaining unit hereinafter referred to * * *" Clearly, the recognition clause limits the rights granted under the contract to the St. Charles plant.

Construing a similar clause, Oddie v. Ross Gear and Tool Company, 6 Cir., 305 F. 2d 143, held that the seniority and recall-to-work rights granted by the contract had no application to a plant relocated in another area, even within the term of the contract.

A fortiori, any such rights under this contract have no application to any other existing plant or to one set up elsewhere after the term of the contract.

A further ground of the motion to dismiss is res judicata, based on the following facts: The Molders Union filed a § 301 action in this Court against Sterling on December 20, 1963, alleging a breach of contract based on the recognition and seniority articles of the agreement. The alleged breach of contract was the transfer of Sterling's Foundry Department to Malden, Missouri, laying off all employees in the Foundry Department of the St. Charles plant, hiring new employees for the transferred Foundry Department operations in Malden, and denying to the St. Charles employees recall privileges. That suit was brought on behalf of the Union and on behalf of the employees, including plaintiffs, as defined in the Recognition clause. Thereafter, on August 26, 1964, the case was dismissed with prejudice to plaintiff and with plaintiff's costs.

Sterling argues that all of the claims asserted in or within the ambit of the present case were embraced in

the former suit brought by the Union both on its own behalf and as agent for its members, and that the dismissal with prejudice constitutes an adjudication on the merits barring the present suit. However, in view of the disposition we have made of the motion to dismiss on other grounds thereof, it is not necessary to decide the issue of res judicata.

Our ruling sustaining Sterling's motion to dismiss is necessarily determinative of plaintiffs' motion for a partial summary judgment. In addition, even if this Court could otherwise compel Sterling at the suit of plaintiffs to make its former foremen and divisional superintendents available for the futile purpose of going through the motions of "discussing" the plant closing, the record is insufficient to show that there is no genuine issue as to any material fact.

In view of the foregoing, plaintiffs' motion for partial summary judgment is overruled and defendant's motion to dismiss is sustained. The Clerk is directed to enter judgment in accordance herewith dismissing plaintiffs' complaint at plaintiffs' costs.

SUPREME COURT, U. S.

APR 7 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 937.

HOLDEN BROWN, GEORGE HOUSE and
GEORGE WOLFF et al.,
Petitioners,

vs.

STERLING ALUMINUM PRODUCTS CORPORATION,
a Missouri Corporation,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

JEROME J. DUFF,
Suite 1155—818 Olive Street,
St. Louis, Missouri 63101,
314—MAin 1-3833,
Attorney for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 937.

HOLDEN BROWN, GEORGE HOUSE and
GEORGE WOLFF et al.,
Petitioners,

vs.

STERLING ALUMINUM PRODUCTS CORPORATION,
a Missouri Corporation,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The petitioners herein pray this Court to grant a rehearing of its order of March 13th, 1967, denying a writ of certiorari, 87 S. Ct. 1023 (1967). Petitioners further pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit as prayed in the petition for certiorari.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

Circumstances of substantial and controlling effect have arisen during the time that the petition for writ of certiorari herein was pending. The decision and majority

opinion of this Court entered on February 27th, 1967, in the case of Vaca v. Sipes, 87 S. Ct. 903 (1967), thoroughly, favorably and affirmatively answers every question presented for determination by these petitioners. The ruling of the Eighth Circuit Court of Appeals in this case is now in direct conflict with this Court's opinion in Vaca v. Sipes (supra).

This case was cited "CF." in the Vaca v. Sipes opinion by Justice Fortas "concurring in the result" with the majority opinion (87 S. Ct. at 922, footnote No. 3).[1] Petitioners urge the grant of rehearing in order to bring a determination of the issues raised herein into conformity with this Court's mandate in Vaca v. Sipes and thereby restore uniformity to the federal common law of labor relations.

CONCLUSION.

For the reasons set forth herein and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that, upon such re-hearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

.....

JEROME J. DUFF,
Counsel for Petitioners.

---

[1] Petitioners point out that this citation has consistently erroneously identified this case as "No. 946, O. T. 1966". This case is No. 937, O. T. 1966. The erroneous designation of No. 946 identifies the companion case to the instant case styled Woody, et al., v. Sterling Company and Unions, etc. A petition for rehearing, virtually identical to this petition, is being simultaneously filed in the Woody v. Sterling Co. and Unions case. Petitioners urge simultaneous consideration of both petitions in the light of the Vaca v. Sipes opinion.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

Jerome J. Duff,
Counsel for Petitioners.

Certificate of Service.

State of Missouri, }
City of St. Louis. } ss.

I, Jerome J. Duff, of counsel for the Petitioners herein and attorney of record for the Petitioners in the Court below, depose that on the 6th day of April, 1967, I served four copies of the foregoing Petition for Rehearing on the Respondents as required by Rule 33, Paragraph 1, by personally mailing said copies hereof to Mr. William Stix, Attorney of Record for Respondent Company, 408 Pine Street, St. Louis, Missouri 63101.

.....

Jerome J. Duff.

Subscribed and sworn to before me at St. Louis, Missouri, on this 6th day of April, 1967.

.....

Notary Public.

My Commission Expires:

.....